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Case No. 93-1027

IN THE

Supreme Court of the United States

October Term, 1993

MARY HORNING, PETITIONER

vs.

STATE OF OHIO, RESPONDENT

Petition for Writ of Certiorari to the
Eighth District Court of Appeals for Cuyahoga County, Ohio

Reply Brief

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STATEMENT OF FACTS[1]

Introduction

Because the Court does not have a transcript of this case and because Respondent's Brief contains no citations to the transcript, there are representations of fact and law in the Brief which mandate this reply, lest a misimpression be created.

The Chronology

A great part of the confusion and irrationality of Mrs. Horning's statement can be seen by comparing the times in her statement to the times advanced by the Respondent in its Statement of Facts.

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[1] Three transcripts compose the trial court record:

- Mrs. Horning's oral statement (which was transcribed at the trial court's request and used as a record in lieu of the audio recording tape);
- the transcript of the motion for suppression hearing; and
- the transcript of the trial.

Citations to these transcripts use the conventions illustrated in the following examples:

C 10,15. Oral statement (Confession) made by Mrs. Horning at the Rocky River police station on May 29, 1991; unedited, text version of motion to suppress tape, State's Motion Exhibit 2. Example refers to page 10, line 15.

S 120, 9-15. Transcript Volume I, Proceedings of Motion to Suppress hearing on February 5, 1991. Example cites page 120, lines 9 through 15.

T 12-13, 20-8. Transcript Volumes II-IV, Trial proceedings. Example is for page 12, line 20 through page 13, line 8.

According to the Respondent's brief, May 15, 1990 went like this:

11:00 A.M.	"Becky Starkey recalls leaving for work at approximately 11:00 A.M. the morning of May 15, 1990."[2]
12:15 P.M.	"According to Captain Kalkbrenner, the fire was incendiary in nature and was started at approximately 12:15 P.M. on May 15, 1990."[3]
12:00 to 12:30 P.M.	"Mrs. Starkey returned home at approximately 12:00 to 12:30 P.M. at the request of the Rocky River Fire Department."[4]

When the Respondent's version of events is compared to Mrs. Horning's statement, one glaring inconsistency is disclosed. The confession of Mrs. Horning's "other personality"[5] stated clearly and unambiguously that it started the fire before Mrs. Horning left on a trip:

> Q. You set the fire upstairs?
> A. Yes.
> Q. You came home after you went to the Goodwill and library?
> A. Before I left.
> Q. Before you left?
> ....

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[2] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 4, paragraph 1.

[3] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 5, paragraph 1.

[4] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 4, paragraph 1.

[5] The context in which Lt. Gunsch whispered his question to Mrs. Horning was as follows: "Do you think, ... one of your personalities would be, have a tendency to arson? Do you think that one of your personalities could have? [C. 17, 16-22].

Q. So when you came back you had ....
A. I was surprised.
Q. You were surprised it was still standing. [C 19-20, 1-21.]

Because Mrs. Horning testified that she left for the Goodwill store and library around 10:00 a.m., the two scenarios are mutually exclusive. Assuming arguendo that the Respondent's Statement of Facts is correct in this regard, the *Petitioner could not have committed the crime* for which she was sentenced to ten years of actual incarceration. Therefore, if we presume Mrs. Horning's statement is in error, then this is but another fundamental way in which her statement was confused and delusional and should have been suppressed.

"No Unusual Behavior"

Respondent's Brief in Opposition states:

> The interview was recorded with petitioner's approval. Lieutenant Gunsch indicated that before, during and after the interview, petitioner did not appear to be under the influence of alcohol or drugs, her speech was coherent, and *she did not exhibit any unusual behavior*.[6] [Italics added]

The audio tape of the interrogation, and the transcript thereof, tell a different tale:

- Her moods during the interrogation ranged from sobbing tearfully to laughing with Lt. Gunsch.
- She was delusional, as was explained in detail in Mrs. Horning's Petition for Writ of Certiorari.
- At one point in the interview when she was asked to write her statement, she became so flustered that she was unable

[6] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 5, paragraph 3.

to write, and a stenographer was called into the interrogation room.

- ☐ She did not "repeatedly" admit to setting the fire; she first denied, then admitted, then said she couldn't remember—all in the space of fifteen minutes.

- ☐ During the interrogation, Lt. Gunsch staged a false diversion in order to apply additional psychological pressure to an already frightened and mentally unbalanced individual.[7]

Immediately after the interrogation, Mrs. Horning was taken by the police to the psychiatric ward of a local hospital. Under these circumstances, and in light of the fact Lt. Gunsch knew in advance that Mrs. Horning was mentally ill, it naturally follows that Mrs. Horning's constitutional rights were violated.

Further illustrating the coercive aspects of police conduct, the written statement, which was prepared by the police and proffered as a word-for-word transcript of the recorded statement, was flagrantly *edited* so as to change the context and meaning of Mrs. Horning's interrogation. Consequently, in addition to the coercion, there was fraud—which goes a long way toward proving coercion.

All the time, to the very end, the prosecution has maintained the written statement was verbatim. Nothing could be further from the truth.

The written statement left out the fact that Mrs. Horning ultimately said she didn't know if one of her personalities set the fire. The written statement also conveniently omits the delusional statements that Mrs. Horning was making in the midst of the

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[7] Q. And is it fair to say that, then, this is a choreographed sort of thing? You go—you have no real reason to leave the room. You do that for effect? A. Yes. Cross-examination of Lt. Gunsch, [T 79, 16-20]. Indeed, Lt. Gunsch's own notes referred to this portion of the interrogation as the "bait and change". [S 63-65, 25-25]; [S 66, 20-25].

statement. Even the trial judge at the suppression hearing remarked that the written statement composed by the police and signed by Mrs. Horning was nowhere near a word-for-word transcription.[8]

Drs. Huntsman and Savinsky

The Respondent raises another point in its brief in opposition that was not addressed in the original Petition for Writ of Certiorari, concerning Drs. Huntsman and Savinsky and their familiarity with Mrs. Horning.

At the outset it should be mentioned that Dr. Huntsman did not testify at the motion to suppress. Only Dr. Savinsky testified. This alone, coupled with the circumstances of the interrogation and Mrs. Horning's mental condition, warrants a reversal of the trial court's denial of Mrs. Horning's motion to suppress—simply because the state failed to sustain its burden of proof.

It also should be noted that Dr. Huntsman is a psychologist with no specialized licensing, who is not board-certified, and who worked for the Court.[9] Dr. Savinsky is a licensed psychiatrist, having earned his degrees from Georgetown University Medical School. Dr. Savinsky completed his psychiatric residency at Georgetown University Hospital (two years) and St. Elizabeth's Hospital (one and one-half years) in Washington, D.C. For eight years Dr. Savinsky has been in private practice.[10]

As for their respective contact with Mrs. Horning, Dr. Huntsman met her once for approximately one and one-half hours for the purpose of preparing a competency report for the Court. Dr. Savinsky, on the other hand, was Mrs. Horning's treating psychiatrist for a period of six years and through nearly 40 hospitalizations.[11]

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[8] S. 76-77, 23-3.
[9] T. 300-301, 10-9.
[10] T. 171-173, 5-8.
[11] T. 173-174, 9-10.

The Respondent states in its brief in opposition that Dr. Savinsky did not review any witness statements, photographs, police reports or the typewritten police summary of Mrs. Horning's statement—as if these documents had some bearing on his professional opinion as to her mental condition at the time of the offense and subsequent interrogation. In fact, they do not. The respondent's criticism of Dr. Savinsky is ludicrous in light of Dr. Huntsman's admission that she had not consulted with Dr. Savinsky, the treating psychiatrist of six years; she had not reviewed the medical records of Mrs. Horning's psychiatric hospitalization; she had not seen the written summary that Respondent now accuses Dr. Savinsky of ignoring; and she had never listened to the audio tape of the interrogation.

By contrast, Dr. Savinsky was the treating physician during Mrs. Horning's hospitalization after the statement, had listened to the entire tape of the interrogation, and was intimately familiar with Mrs. Horning's medical and psychiatric history.

ARGUMENT

The Fifth Amendment

If the Respondent is correct about the lack of a federal question, then this Court must have erred in accepting the *Blackburn*[12] and *Townsend*[13] cases and all those like them. Those cases posed the same type of federal question—to what extent does the United States Constitution protect mentally handicapped individuals from coercive interrogation? Should such coercion be condoned by accepting at face value the interrogating officer's self-serving observation that the defendant looked and acted normal?

The Petitioner does not suggest that mental illness equates to involuntariness. But she *does* maintain that the Respondent errs in the other direction when it implies that no special consideration is required in cases involving the interrogation of persons undeniably beset by mental illness. This was the holding of the *Miller*[14] case, which held that "there is little doubt that mental illness can interfere with a defendant's ability to make a knowing and intelligent waiver of his Miranda rights."

Limitation on Cross-examination

In its argument on the cross-examination issue, the Respondent is incorrect about the application of Rule 602 of the Ohio Rules of Evidence to Mrs. Horning's case. In its brief in opposition, the Respondent argues that "Evid. R. 602 provides that witnesses may only testify as to matters of which they have personal knowledge."[15] What is inaccurate and misleading about the Respondent's contention is that Rule 602's prohibition against

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[12] *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960).

[13] *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

[14] *Miller v. Dugger*, 838 F.2d 1530 (11th Cir. 1988).

[15] Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 11.

testimony not founded on personal knowledge contains a specific exception for the testimony of expert witnesses.

> **Rule 602. Lack of Personal Knowledge**
> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

There is nothing new or unusual about this exception to Rule 602. The same exception is present in the Federal Rules of Evidence. Rule 703 provides "the facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

Therefore, since the Respondent was offering the statements into evidence, it was fair game for defense counsel to ask the state's expert psychiatric witness questions about those statements. These were the same statements which the State had introduced into evidence against Mrs. Horning—the same statements in which Mrs. Horning's mental state was in issue!

Far from being constrained, by some Ohio rule, to limit Petitioner's Sixth Amendment right of confrontation, the trial court was *required* to permit cross-examination on all relevant issues.

Rule 611(B) of the Ohio Rules of Evidence, titled "Scope of Cross-examination", provides:

> Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

If Rule 611(B) is being used to deny defendants effective cross-examination, then the Rule violates the Sixth Amendment. But Petitioner contends the trial court *ignored* the commands of *both* the

Sixth Amendment *and* Rule 611(B), which implements the right of confrontation in Ohio.

CONCLUSION

In the "Conclusion" of Respondent's Brief in Opposition, the State of Ohio appears to concede there is a federal question to Mrs. Horning's case after all. But according to Respondent, that federal question just isn't important enough to warrant this Court's attention.[16] Such apathy and ignorance may well mirror local opinion. For the nation, as a whole, to embrace such views would be dangerous indeed.

The federal question raised by Mrs. Horning's case is, of course, critical for her and her husband. She faces a ten-year prison sentence without the possibility of probation or parole. But the situation is critical not only for the Hornings.

There is a widespread need for federal attention to this problem—the criminalizing of mental illness—imprisoning the mentally ill, for long stretches at a time, often for trivial offenses, as an alternative to treatment or community-based care. Statistics indicate this problem has reached staggering proportions.[17]

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[16] "The Petition for Writ of Certiorari should be denied. There has been no *important* question of federal law decided by the State appellate court and no *important* and special reason exists for the granting of a Writ of Certiorari." Respondent State of Ohio's Brief in Opposition to Petition for Writ of Certiorari, page 12, paragraph 1. [Italics added].

[17] Clinical studies suggest that 10 to 15 percent of prison populations have a major DSM-III-R thought disorder or mood disorder and need the services usually associated with severe or chronic mental illness. Jemelka, R., Trupin, E., and Childes, J.A. The mentally ill in prisons: A Review. Hospital and Community Psychiatry 40: 481-485, 1989. A nationwide survey of 1,391 local jails, which together hold 62 percent of our nation's jail inmates, has revealed the unimaginable: 7.2 percent of jail inmates—more than one of every 14 inmates—suffer from serious mental illness. E. Fuller Torrey, Joan Steiber, Jonathan Ezekiel, Sidney Wolfe, Joshua Sharfstein, John H. Noble and Laurie M. Flynn, *Criminalizing the Seriously Mentally Ill*, Public Citizens Health Research Group and the National Alliance for the Mentally Ill, 1992.

Large numbers of mentally ill persons are simply denied constitutional protections on criminal charges. These denials are routinely upheld on a theory of "waiver." An even larger number are incarcerated—without criminal convictions or even charges—as a means of cheap medical treatment! The issue is so much a "federal question" that it now forms part of the movement for national health care reform.

For all of these reasons, Mrs. Horning respectfully requests that the Court accept jurisdiction of her case.

Respectfully submitted,

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APPENDIX

Amendments to the United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Ohio Rules of Evidence

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 611. Mode and Order of Interrogation and Presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.